No. 17-1471

IN THE

# Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

*Petitioner,*

v.

GEORGE W. JACKSON,

*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Whether the removal provision of the Class Action Fairness Act, 28 U.S.C. § 1453, allows a party that is not a defendant as this Court construed that term in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), to remove class counterclaims asserted by the defendant in a state-court action.

## PARTIES TO THE PROCEEDING

The petition's statement of parties (Pet. ii) correctly identifies the entities that were parties to the proceedings below and are parties in this Court. Its characterization of petitioner Home Depot, U.S.A., Inc., and Carolina Water Systems, Inc., as "original defendant[s]," however, reflects Home Depot's position on the substantive issue raised in the petition, which respondent George W. Jackson contests. In the proceedings below, all parties (including Home Depot) as well as the court of appeals and district court, referred to Home Depot as a "third-party defendant" or "additional counter-defendant." *See* Pet. App. 1a, 5a. Mr. Jackson was referred to as defendant, counter-plaintiff, and third-party plaintiff.

Home Depot's statement of parties also inaccurately states that Mr. Jackson's putative class action was "brought as a counterclaim in the district court," which in context appears to refer to the federal district court. Pet. ii. Home Depot was indisputably made a party to Civil Action No. 16 CVD 10961, Citibank's collection action filed in the North Carolina General Court of Justice, District Court Division, Mecklenburg County, by way of Mr. Jackson's Answer, Affirmative Defenses, Counterclaim, and Third-Party Class Action Claims filed on August 26, 2016. Mr. Jackson's class action was filed as a counterclaim in state court, not the federal district court.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDINGS ..... ii

TABLE OF AUTHORITIES ..... iv

INTRODUCTION ..... 1

STATEMENT ..... 3

REASONS FOR DENYING THE WRIT ..... 11

I. Review of an issue on which the circuits are in agreement is unwarranted. ..... 11

II. The lower courts' consensus is correct and does not conflict with this Court's decisions. ..... 15

A. CAFA incorporates the settled construction of the term "defendant" as used in other removal statutes. ..... 15

B. Home Depot's arguments for a different construction of CAFA are unpersuasive and provide no reason for review by this Court. ..... 18

III. The policy arguments of Home Depot and its amici do not warrant review. ..... 23

CONCLUSION ..... 28

## TABLE OF AUTHORITIES

**Cases:** **Page(s)**

*Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*,
637 F.3d 827 (7th Cir. 2011) ..... 22

*Bragdon v. Abbott*,
524 U.S. 624 (1998) ..... 15

*Bruesewitz v. Wyeth LLC*,
562 U.S. 223 (2011) ..... 19

*Chicago, Rock Island & Pac. Ry. v. Martin*,
178 U.S. 245 (1900) ..... 17

*Cyan, Inc. v. Beaver County Employees Retirement Fund*,
138 S. Ct. 1061 (2018) ..... 24

*Dart Cherokee Basin Operating Co. v. Owens*,
135 S. Ct. 547 (2014) .....*passim*

*First Bank v. DJL Props., LLC*,
598 F.3d 915 (7th Cir.), *cert. denied*,
562 U.S. 1003 (2010) .....6, 11, 13, 19, 21

*Flora v. United States*,
362 U.S. 145 (1960) ..... 21

*Flores-Figueroa v. United States*,
556 U.S. 646 (2009) ..... 20

*Henson v. Santander Consumer USA Inc.*,
137 S. Ct. 1718 (2017) ..... 24

*Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*,
559 U.S. 573 (2010) ..... 15

*Johnson v. Pushpin Holdings, LLC*,
748 F.3d 769 (7th Cir. 2014) ..... 22

*Lamar, Archer & Cofrin, LLP v. Appling*,
No. 16-1215 (U.S. June 4, 2018) ..... 15

*Marx v. Gen. Revenue Corp.*,
568 U.S. 371 (2013) ..... 20

*Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*,
547 U.S. 71 (2006) ..... 16

*Miss. ex rel. Hood v. AU Optronics Corp.*,
571 U.S. 161 (2014) ..... 3, 16

*In re Morgan & Pottinger, P.S.C.*,
2010 WL 9476582 (6th Cir. 2010)..... 6, 11

*In re Mtge. Elec. Registration Sys., Inc.*,
680 F.3d 849 (6th Cir. 2012) .....6, 11, 12, 13, 19

*Palisades Collections LLC v. Shorts*,
552 F.3d 327 (4th Cir. 2008), *cert. denied*,
557 U.S. 919 (2009) .....*passim*

*Progressive W. Ins. Co. v. Preciado*,
479 F.3d 1014 (9th Cir. 2007) ..... 4, 11, 13, 26

*Scott v. Cricket Commc'ns, LLC*,
865 F.3d 189 (4th Cir. 2017) ..... 22

*Shamrock Oil & Gas Corp. v. Sheets*,
313 U.S. 100 (1941) .....*passim*

*Strawn v. AT&T Mobility LLC*,
530 F.3d 293 (4th Cir. 2008) ..... 22

*Rodriguez v. United States*,
480 U.S. 522 (1987) ..... 22

*Rowe v. N.H. Motor Transp. Assn.*,
552 U.S. 364 (2008) ..... 15, 16

*Small v. United States*,
544 U.S. 385 (2005) ..... 21

*Snyder v. Harris*,
394 U.S. 332 (1969) ..... 17

*Spivey v. Vertrue*,
528 F.3d 982 (7th Cir. 2008) ..... 22

*Strawbridge v. Curtiss*,
7 U.S. 267 (1806) ..... 17

*Tri-State Water Treatment, Inc., v. Bauer*,
845 F.3d 350 (7th Cir.), *cert. denied sub nom. Home Depot U.S.A., Inc. v. Bauer*,
137 S. Ct. 2138 (2017) ..... *passim*

*United States v. Hayes*,
555 U.S. 415 (2009) ..... 15

*United States v. Palmer*,
16 U.S. 610 (1818) ..... 21

*Westwood Apex v. Contreras*,
644 F.3d 799 (9th Cir. 2011) ..... *passim*

*Zahn v. Int'l Paper Co.*,
414 U.S. 291 (1973) ..... 17

**Statutes and Rules:**

Class Action Fairness Act of 2005,
Pub. L. No. 109-2, 119 Stat. 4 ..... *passim*

Federal Courts Jurisdiction and Venue Clarification Act of 2011,
Pub. L. No. 112-63, 125 Stat. 758 ..... 27

Statutory Time Periods Technical Amendments Act of 2009,
Pub. L. No. 111-16, 123 Stat. 1607 ..... 27, 28

28 U.S.C. § 1332(d) ..... 3, 8, 17

28 U.S.C. § 1441 ..... 1, 11, 14, 16
28 U.S.C. § 1441(a) ..... *passim*
28 U.S.C. § 1441(b) ..... 17
28 U.S.C. § 1446 ..... 4, 5, 16, 27
28 U.S.C. § 1446(a) ..... 4, 16
28 U.S.C. § 1446(c) ..... 17
28 U.S.C. § 1447 ..... 17
28 U.S.C. § 1447(d) ..... 4
28 U.S.C. § 1453(b) ..... *passim*
28 U.S.C. § 1453(c) ..... 4, 17, 27, 28
N.C. Gen. Stat. § 25A-37 ..... 6
S. Ct. R. 10 ..... 2

**Legislative Materials:**

Class Action Fairness Act of 1998, S. 2083 ..... 18
Class Action Fairness Act of 2002, H.R. 2341 ..... 18
Class Action Fairness Act of 2003, S. 274 ..... 18
Interstate Class Action Jurisdiction Act of 1999, H.R. 1875 ..... 18
S. Rep. No. 109-14 (2005) ..... 18, 19, 20

**Other:**

FTC, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013)..... 26

Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L. Rev. 179 (2014).... 26

## INTRODUCTION

In *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), this Court held that a state-court plaintiff against whom the defendant has asserted a counterclaim is not a "defendant" entitled to remove the action to federal court under the predecessor to 28 U.S.C. § 1441, which provides for removal by "the defendant or the defendants." In the decades that followed, the lower federal courts broadly agreed that, under the reasoning of *Shamrock Oil*, third-party defendants and additional counter-defendants are likewise not defendants entitled to remove under § 1441.

When Congress enacted the Class Action Fairness Act (CAFA) in 2005, it altered many principles applicable to diversity and removal jurisdiction over class actions, but it left intact the rule that only a defendant can remove a case based on diversity. *See* 28 U.S.C. § 1453(b). As a result, beginning two years after CAFA's enactment and continuing to the present, all the courts of appeals that have considered the question—the Fourth, Sixth, Seventh, and Ninth Circuits—have held that CAFA incorporates the principles developed in *Shamrock Oil* and its progeny, and that a state-court counter-defendant thus may not remove an action under CAFA.

Given the absence of circuit conflict on this question of statutory construction, this Court has denied certiorari on the issue three times, most recently last year when Home Depot—the same petitioner as in this case—raised it in another case. *See Home Depot U.S.A., Inc. v. Bauer*, 137 S. Ct. 2138 (2017) (denying review of *Tri-State Water Treatment, Inc., v. Bauer*, 845 F.3d 350 (7th Cir. 2017)). In its current petition, Home Depot once again asserts that the circuits have

created a "loophole" in CAFA, *see* Pet. 2, *Bauer* Pet. 1, but it points to no reason that the issue merits review now any more than last year. The only development since then is that the Fourth Circuit has reaffirmed its decade-old holding in *Palisades Collections LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008), *cert. denied*, 557 U.S. 919 (2009)—this time with the agreement of Judge Niemeyer, the only circuit judge among the over twenty who have considered the issue who has ever dissented from applying the established meaning of "defendant" to CAFA. *Compare* Pet. App. 2a (joining opinion), *with Palisades*, 552 F.3d at 337 (dissenting).

Review of this narrow question of statutory construction, on which the courts of appeals are in complete agreement, remains unwarranted. Home Depot's argument for review is based on its view that the circuit consensus is wrong, but such arguments rarely provide sufficient justification for this Court to devote its resources to considering an issue. *See* S. Ct. R. 10. Here, the argument is particularly unpersuasive because the lower courts' consensus neither "depart[s] from the accepted and usual course of judicial proceedings" nor "conflicts with relevant decisions of this Court." *Id.* Far from it: The courts of appeals have correctly construed CAFA.

Home Depot's assertion that the courts' construction has "provided a roadmap for circumventing the clear purpose of the Act," Pet. 22, is exaggerated and unconvincing. Regardless, those who share the belief of Home Depot and its amici that the statute's terms contain a "loophole" that undermines its purposes should take their complaint to Congress. That Congress has done nothing in the years since the judicial consensus on this issue emerged underscores that

Home Depot's assertion that the courts of appeals have flouted congressional intent is incorrect.

## STATEMENT

1. In enacting CAFA, Congress addressed a number of limitations on federal original and removal jurisdiction over class actions based on diversity of citizenship. As this Court explained in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014), "CAFA expanded diversity jurisdiction [for class actions] in two key ways": it replaced the "ordinary requirement of complete diversity of citizenship among all plaintiffs and defendants ... with a requirement of minimal diversity" between any defendant and any class member, and it replaced the requirement that "each plaintiff's claim ... exceed" the amount-in-controversy threshold with a grant of jurisdiction over class actions "in which the *aggregate* amount in controversy exceeds $5 million." *Id.* at 165 (emphasis added); *see* 28 U.S.C. § 1332(d). CAFA's creation of original federal jurisdiction over diversity class actions, however, was not unlimited: In addition to the $5 million amount-in-controversy requirement, CAFA requires that a class action must involve at least 100 class members, and it provides for federal courts to decline jurisdiction over certain claims involving local controversies, home-state defendants, governmental defendants, and securities or corporate government matters. *See* 28 U.S.C. §§ 1332(d)(2), (3), (4), (5), & (9).

CAFA also expanded the availability of removal for state-court class actions that fall within its grant of original federal jurisdiction. Specifically, the statute eliminated three limitations normally applicable when defendants seek to remove a diversity case: the prohibition on removal by a defendant sued in its

home state, the requirement that all defendants must consent to or join in a removal petition, and the bar on removal more than one year after an action is first filed. *See* 28 U.S.C. § 1453(b). In addition, CAFA created a procedure for permissive appeals of orders remanding class actions to state courts on jurisdictional grounds, which would otherwise be barred by 28 U.S.C. § 1447(d). *See* 28 U.S.C. § 1453(c); *see also Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 552 (2014).

One respect in which CAFA does *not* depart from prior jurisdictional and removal statutes is that it provides for removal only by a "defendant," 28 U.S.C. § 1453(b), and it incorporates the pre-existing removal-procedure statute, 28 U.S.C. § 1446, which provides that removal requires a petition filed by a "defendant or defendants." *Id.* § 1446(a).

As a result, soon after CAFA's passage, the Ninth Circuit concluded in *Progressive West Insurance Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007), that, in enacting CAFA, Congress incorporated into the statute the same limit on removal that courts had imposed on existing removal statutes based on the holding of *Shamrock Oil*: A plaintiff named in a counterclaim "is not a defendant for purposes of the federal removal statutes and therefore cannot remove an action to federal court." *Id.* at 1017. "CAFA," the court stated, "does not create an exception to *Shamrock*'s longstanding rule." *Id.*

A year later, the Fourth Circuit in *Palisades* held that CAFA likewise precludes removal by an "additional counter-defendant"—*i.e.*, a counter-defendant other than the original plaintiff. The court pointed out that in the decades following *Shamrock Oil*, federal

courts applying its teaching had "refused to grant removal power under § 1441(a) to third-party defendants." 552 F.3d at 332. The court further noted that "additional counter-defendants, like third-party defendants, are certainly not defendants against whom the original plaintiff asserts claims," and thus such a party "is not a 'defendant' for purposes of § 1441(a)" under *Shamrock Oil* as applied by the courts prior to CAFA. *Id.* at 333. Because CAFA likewise refers to a "defendant" as the "party who may remove" and provides for removal in accordance with § 1446, which also uses the term "defendant or defendants," *Palisades* concluded that "Congress clearly did not intend to extend the right of removal to parties other than 'defendant[s]'" when it enacted CAFA. *Id.* at 334.

The Fourth Circuit further rejected the argument that CAFA's use of the words "any defendant" in the phrase "such action may be removed by any defendant without the consent of all defendants," 28 U.S.C. § 1453(b), expanded the universe of "defendants" entitled to remove. The court reasoned that "the use of the word 'any' cannot change the meaning of the word 'defendant,'" and that the word, read in context, was intended to "eliminate[] the judicially-recognized rule of unanimous consent to removal." *Id.* at 335. As the court explained, "the use of the word 'any' juxtaposed with the word 'all' was intended to convey the idea of non-unanimity, not to alter the definition of the word 'defendant.'" *Id.* at 335–36. The court thus concluded:

> Put simply, there is no indication in the language of § 1453(b) (or in the limited legislative history) that Congress intended to alter the traditional rule that only an original defendant may remove and to somehow transform an additional counter-defendant ... into a "defendant" with the power to

> remove. Reading § 1453(b) to also allow removal by counter-defendants, cross-claim defendants, and third-party defendants is simply more than the language of § 1453(b) can bear.

*Id.* at 336. This Court denied certiorari. 557 U.S. 919 (2009).

Following the Fourth Circuit's decision in *Palisades*, the Sixth, Seventh, and Ninth Circuits agreed with its holding. *See Tri-State Water*, 845 F.3d at 356; *In re Mtge. Elec. Registration Sys., Inc.*, 680 F.3d 849, 854 (6th Cir. 2012) (*"MERS"*); *Westwood Apex v. Contreras*, 644 F.3d 799, 806 (9th Cir. 2011); *First Bank v. DJL Props., LLC*,598 F.3d 915, 916–17 (7th Cir. 2010); *In re Morgan & Pottinger, P.S.C.*, 2010 WL 9476582, at *1 (6th Cir. 2010). This Court denied certiorari in *First Bank*, 562 U.S. 1003 (2010), and, last year, in *Tri-State Water*, 137 S. Ct. 2138.

**2.** This case began when Home Depot, Carolina Water Systems, Inc. (CWS), and Citibank acted in concert to sell respondent George Jackson an unnecessary water treatment system and to provide financing for that transaction. In so doing, they employed unfair and deceptive practices, including an unlawful referral scheme that violates North Carolina's Referral Sales Statute, N.C. Gen. Stat. § 25A-37, and a deceptive and misleading sales presentation designed to scare Mr. Jackson into believing that his water was contaminated and unsafe.[1]

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[1] Because the case was removed at the pleading stage, the description of the alleged unlawful conduct is based on the allegations in Mr. Jackson's counterclaim, which are set forth in the Fourth Circuit Joint Appendix at A-26–A-45.

The scheme worked as follows: Representatives of Home Depot and CWS would perform in-home sales presentations that included pitching the unlawful referral scheme, benign water tests that the representatives alleged demonstrated water contamination, and other deceptive and misleading sales tactics. These unfair and deceptive practices induced Mr. Jackson and other members of the putative class in this case to enter into sales contracts with CWS for the purchase of water treatment systems. Home Depot then provided the systems and installed them pursuant to a "home improvement agreement." Home Depot also arranged for financing of the systems by offering purchasers a Home Depot branded credit card, issued by Citibank. Citibank then serviced the credit card debt. The interest rate on the credit card was 25.99% after the first year.

Citibank sued Mr. Jackson in a North Carolina state court alleging that he had failed to pay for the water-treatment system he had purchased from Home Depot and CWS using a Home Depot credit card issued by Citibank. Mr. Jackson answered and asserted a counterclaim against Citibank as well as third-party class action claims against additional counter-defendants Home Depot and CWS. The counterclaim alleged that Home Depot and CWS had engaged in unfair and deceptive trade practices by misleading consumers about the water-treatment systems and that Citibank was liable as an assignee of their claims for payment. The putative class consists of approximately 286 members who purchased water systems from CWS and Home Depot in North Carolina, 259 of whom had North Carolina home addresses.

Home Depot's petition wrongly asserts that Home Depot "was not a party to that [state-court] action, and

never became a party to that collection dispute." Pet. i. In fact, it is undisputed that Mr. Jackson's claims against Home Depot and CWS, as well as his counter-claim against Citibank, were all filed in state court on August 26, 2016, making all three entities parties to the state-court action.

Shortly after Citibank voluntarily dismissed its state-court claims without prejudice, Home Depot removed the case under CAFA to the U.S. District Court for the Western District of North Carolina. Following the binding circuit precedent of *Palisades*, the district court remanded the case to the state court. Pet. App. 16a. As a result of that ruling, the district court did not reach two alternative grounds for remand argued by Mr. Jackson:

(1) that Home Depot had failed to show that the amount in controversy exceeded CAFA's jurisdictional threshold of $5 million, given that there were only 286 class members and the lead plaintiff, Mr. Jackson, claimed to have suffered damages of little more than $1000; and

(2) that the case was subject to mandatory remand under CAFA's "local controversy" exception, 28 U.S.C. § 1332(d)(4)(A), because at least two thirds of the members of the class and CWS, a counter-defendant from whom significant relief was sought and whose conduct formed a significant basis of the claims, were citizens of North Carolina, the principal injuries alleged occurred in North Carolina, and there had been no similar class action filed against Home Depot, Citibank and CWS on behalf of the class

members within the previous three-year period.

The Fourth Circuit granted Home Depot permission to appeal and, in a unanimous opinion—joined in full by Judge Niemeyer, who had *dissented* in *Palisades*—affirmed. The court began by explaining that its decision in *Palisades* had already determined that CAFA's use of the term "defendant" to describe the parties entitled to remove incorporated the settled meaning of that term under other removal statutes and precluded removal of a class action counterclaim by an additional counter-defendant. Pet. App. 4a–7a. The court further noted that subsequent to *Palisades*, the Seventh and Ninth Circuits had followed its holding as to additional counter-defendants. Pet. App. 7a.

The court then addressed, and rejected, Home Depot's argument that this Court's decision in *Dart Cherokee* effectively overruled *Palisades* by holding that there is no "antiremoval presumption" under CAFA. 135 S. Ct. at 554. The court concluded that *Palisades* did not rest on any such presumption. Rather, the court explained, *Palisades* recognized that "Congress clearly wished to expand federal jurisdiction through CAFA." Pet. App. 10a (quoting *Palisades*, 552 F3d. at 336). *Palisades* nonetheless concluded that in using the term "defendant" to describe the parties entitled to remove a class action, CAFA adopted the "well-established meaning" of that term, which excluded removal by parties facing counterclaims. Pet. App. 11a. That conclusion did not rest on an "antiremoval presumption," but on the presumption that Congress is "aware of judicial interpretations" and "intends to adopt" the meanings they have given to statutory terms when it uses the same terms in later enactments. *Id.* Failure to apply that presumption here, the

court stated, would "give the term 'defendant' in the[] interlocking removal statutes different meanings" and thus "render the provisions 'incoherent.'" *Id.* (citation omitted).

The court also rejected the argument—not advanced by Home Depot in its petition for certiorari—that *Palisades* was distinguishable because the original plaintiff had dropped its claims before Home Depot removed, turning Home Depot from a counter-defendant into a defendant. Considering the "complex timeline of events in this case," Pet. App. 12a, the court pointed out that at the time of removal Citibank remained a counter-defendant, as Mr. Jackson had not dropped his claims against it, and hence Home Depot was thus still an additional counter-defendant. The court further noted that allowing removal in such circumstances would invite gamesmanship—and allow the original plaintiff de facto removal authority—by giving the original plaintiff the power to determine whether an additional counter-defendant could remove. Pet. App. 13a.

Finally, the court of appeals held that the district court had not erred in declining Home Depot's request to realign the parties, with Mr. Jackson as plaintiff and Home Depot as defendant. The court noted that realignment doctrine was created to prevent parties from "fraudulently manufactur[ing] diversity jurisdiction," Pet. 15a, by situating parties who would otherwise destroy diversity on the wrong side of the "v." Noting that this case did not involve any such sham attempt to create diversity jurisdiction, the court declined to apply realignment principles "outside their traditional domain." Pet. 15a. As with the court's holding on Citibank's dismissal of its claims, Home Depot

does not seek review of the court's realignment holding or claim that it presents an issue meriting review.

## REASONS FOR DENYING THE WRIT

### I. Review of an issue on which the circuits are in agreement is unwarranted.

Whether CAFA incorporates the *Shamrock Oil* principle that removal is limited to "defendants"—and hence does not extend to "counterclaim defendants," "third party defendants," or "additional counter-defendants"—has been the subject of only eight federal appellate decisions in four circuits in the thirteen years since CAFA's enactment. Although the issue has not arisen with great frequency, the rulings addressing it have been remarkable in their consistency. Each has held that "defendant" in CAFA means the same thing as in the statute at issue in *Shamrock Oil* and its direct descendant, 28 U.S.C. § 1441. *See* Pet. App. 9a, *Tri-State Water*, 845 F.3d at 354–57; *MERS*, 680 F.3d at 853–54; *Westwood*, 644 F.3d at 804–07; *First Bank*, 598 F.3d at 917; *Morgan & Pottinger*, 2010 WL 9476582, at *1; *Palisades*, 552 F.3d at 332–36; *Progressive*, 479 F.3d at 1017–18.

No less notable than the circuits' unanimity in holding that neither original plaintiffs nor third parties named as counter-defendants may remove under CAFA is the diverse range of judges who have written and joined in those decisions, which collectively generated only one dissenting opinion. The authors of the courts' published opinions include Judge Sandra Ikuta in *Progressive West*; then-Chief Judge Karen Williams in *Palisades*; then-Chief Judge Frank Easterbrook in *First Bank*; Judge Milan Smith in *Westwood*; Judge Boyce Martin in *In re MERS*; Chief

Judge Diane Wood in *Tri-State Water*; and Judge Allyson Duncan in the decision below. Even judges who have had reservations about the *policy* of not allowing removal in such circumstances have acknowledged that Congress incorporated that "established legal principle" into CAFA. *Westwood*, 644 F.3d at 808 (Bybee, J., concurring).

Although only two of the decisions on the subject postdate this Court's opinion in *Dart Cherokee*, the opinions in those two agree that nothing in *Dart Cherokee* calls into question the courts' conclusion that Congress did not displace the *Shamrock Oil* principle when it enacted CAFA. *See* Pet. App. 9a–11a; *Tri-State Water*, 845 F.3d at 356. As *Tri-State Water* explains, *Dart Cherokee* "does not address the issue," and *Dart Cherokee*'s statement "that there is 'no anti-removal presumption ... [in] cases invoking CAFA'" has no bearing because the holding that Congress incorporated the *Shamrock Oil* principle into CAFA does not reflect "such an anti-removal presumption." 845 F.3d at 356 (quoting *Dart Cherokee*, 135 S. Ct. at 534).

The court below took exactly the same view, *see* Pet. App. 10a–11a. Indeed, Judge Niemeyer, whose dissent in *Palisades* formerly had been the lone expression of disagreement by any federal appellate judge with the proposition that CAFA incorporates the limits on removal derived from *Shamrock Oil*, this time joined without reservation in the panel's explanation that "*Dart Cherokee* did not undermine *Palisades*' interpretation of § 1441(a) and § 1453(b)" and that it would be "incoherent" to "give the term 'defendant' in these interlocking removal statutes different meanings." Pet. App. 11a.

Home Depot recognizes that those courts of appeals that have had occasion to address the issue were in complete agreement before *Dart Cherokee* and remain so after *Dart Cherokee*. Hoping to make lemonade from lemons, Home Depot attempts to transform the agreement among the circuits from a reason for denying review into a reason for granting it. Home Depot asserts that the "problem" it thinks is posed by the lower courts' agreement will not "ripen into ... a circuit split because the courts of appeals view their erroneous interpretation of CAFA as compelled by this Court's broad language in *Shamrock Oil*," and "[o]nly this Court can clarify the scope of its holding in *Shamrock Oil*." Pet. 25.

These assertions fundamentally misunderstand the basis of the lower courts' decisions. None of the courts addressing the issue stated that the result is "compelled" by *Shamrock Oil* itself. Rather, acknowledging that the Court in *Shamrock Oil* was not "speaking one way or the other to the situation that confronts us here," *Tri-State Water*, 845 F.3d at 354, the courts uniformly based their holdings on their construction of CAFA—that is, their conclusion that it is "CAFA's use of 'time-tested legal language'" that "requires us to adhere to the *Shamrock Oil* rule," *id.* (quoting *First Bank*, 598 F.3d at 917), not the *stare decisis* effect of *Shamrock Oil* in its own right.[2]

Of course, if the issue were whether *Shamrock Oil* should be *overruled*, there would be no doubt that only

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[2] *See also* Pet App. 10a–11a; *MERS*, 680 F.3d at 85; *Westwood*, 644 F.3d at 805–07; *id.* at 808–09 (Bybee, J., dissenting); *First Bank*, 598 F.3d at 917; *Palisades*, 552 F.3d at 336; *Progressive*, 479 F.3d at 1018.

this Court could do so. But Home Depot does not contend that its position requires overruling *Shamrock Oil*. Neither its question presented nor the body of its petition asks the Court to do so, even as an alternative ground of decision. Given that overruling *Shamrock Oil* is not on the table, Home Depot's argument falls flat, because nothing would bar lower courts from disagreeing about the "scope" of this Court's holdings if there were a basis for doing so. Here, however, the courts have found no basis for disagreement.

In any event, the issue is not really the "scope" of *Shamrock Oil*'s holding. Home Depot does not ask this Court to decide that the lower courts have misapplied *Shamrock Oil* in traditional removal cases under 28 U.S.C. § 1441 or claim that there is any disagreement about its scope in that context. Indeed, Home Depot explicitly disavows any intent to raise an issue about the correctness of the judicial consensus that *Shamrock Oil* precludes removal by third-party counter-defendants under § 1441. Pet. 13. The only question is whether Congress adopted or altered what Home Depot concedes was the settled construction of § 1441 developed in the wake of *Shamrock Oil* when it used the word "defendant" to define who could remove class actions under CAFA. That is an issue of congressional intent, not of the scope of *Shamrock Oil*'s holding. If the courts of appeals were persuaded that Home Depot and other proponents of extending removal to parties other than defendants offered the better interpretation of CAFA, *Shamrock Oil* would not itself disable them from accepting it.

Granted, a circuit split is *unlikely* to develop because, so far, the courts uniformly have found the argument for Home Depot's construction unpersuasive and are likely to continue to do so. Such agreement is

hardly a reason for this Court to grant review. Unless and until a conflict among the circuits develops as a result of a ruling from one of the eight federal circuits that have not yet addressed the issue, there is no need for this Court to step in.

## II. The lower courts' consensus is correct and does not conflict with this Court's decisions.

### A. CAFA incorporates the settled construction of the term "defendant" as used in other removal statutes.

The construction of CAFA by the courts of appeals reflects a correct application of conventional principles of statutory construction. Home Depot concedes that, in the more than fifty years since the decision in *Shamrock Oil*, the federal courts have consistently recognized that a third-party defendant is not a "defendant" entitled to remove cases under 28 U.S.C. § 1441(a). *See* Pet. 12–13 (citing *Palisades*, 552 F.3d at 332). In enacting CAFA, Congress used the same term—"defendant"—to define the class of parties entitled to remove class actions under the new statute. 28 U.S.C. § 1453(b).

This Court has "often observed that when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its ... judicial interpretations as well.'" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 590 (2010) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)). *See also, e.g., Lamar, Archer & Cofrin, LLP v. Appling*, No. 16-1215, slip op. at 11 (U.S. June 4, 2018); *United States v. Hayes*, 555 U.S. 415, 424–25 (2009); *Rowe v. N.H.*

*Motor Transp. Assn.*, 552 U.S. 364, 370 (2008); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006). This Court specifically recognized the applicability of this interpretive principle to CAFA when it held that, in enacting CAFA, Congress incorporated the established meaning of the term "plaintiffs" as used in Federal Rule of Civil Procedure 20. *Hood*, 571 U.S. at 169–72. As the courts of appeals have recognized, a straightforward application of the principle similarly indicates congressional intent to incorporate the then-existing understanding of the scope of the term "defendant" into CAFA.

That reading of the statute finds additional support in section 1453(b)'s express statement that class actions are to be removed "in accordance with section 1446." Section 1446, which specifies procedures applicable to removals under section 1441 and other removal statutes, echoes both *Shamrock Oil* and section 1441(a) in referring to removal by "[a] defendant or defendants." 28 U.S.C. § 1446(a); *see Tri-State Water*, 845 F.3d at 354 ("Sections 1441 and 1446 use the *Shamrock Oil* definition of the word 'defendant.'"). It would be extremely odd—even "incoherent," *Tri-State Water*, 854 F.3d at 354—to give the word "defendant" in section 1453(b) a more expansive meaning when that section incorporates by reference procedures that themselves apply only to the traditional class of defendants.

The inference that CAFA incorporates the pre-existing understanding of the term "defendant" is strongly supported by the fact that, when Congress intended CAFA to override limits on federal diversity jurisdiction and removal formerly applicable to class actions, it did so explicitly. Thus, for the class actions to

which it applies, CAFA expressly supplanted the following judicial and statutory restrictions on diversity and removal jurisdiction:

- the holdings of *Strawbridge v. Curtiss*, 7 U.S. 267 (1806), and *Snyder v. Harris*, 394 U.S. 332 (1969), that complete diversity of citizenship of named plaintiffs and defendants is required for diversity jurisdiction, superseded for class actions by 28 U.S.C. § 1332(d)(2);
- the holding *of Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that damages claims of class members may not be aggregated to satisfy amount-in-controversy requirements, superseded for class actions by 28 U.S.C. § 1332(d)(6);
- the holding of *Chicago, Rock Island & Pacific Ry. v. Martin*, 178 U.S. 245 (1900), requiring all defendants to join in removal of a case from state court, superseded for class actions by 28 U.S.C. 1453(b);
- the statutory prohibition on diversity removal by defendants sued in their home states, *see* 28 U.S.C. § 1441(b), superseded for class actions by 28 U.S.C. § 1453(b);
- the statutory prohibition on removing an action on diversity grounds more than one year after it is first filed, *see* 28 U.S.C. § 1446(c), superseded for class actions by 28 U.S.C. § 1453(b); and
- the statutory prohibition on appeals of orders remanding removed cases to state courts, *see* 28 U.S.C. § 1447, altered for class actions by 28 U.S.C. § 1453(c).

In each instance, unmistakable statutory language overrides the preexisting judicial or statutory limit on

jurisdiction. Moreover, the statute's legislative history expressly identifies the specific judicial decisions and statutory provisions that CAFA supplants. *See, e.g.*, S. Rep. No. 109-14, at 9 n.2, 10, 48–50 (2005). By contrast, nothing in the statutory language calls for a different construction of the term "defendant" from that in preexisting removal statutes, and the legislative history suggests no intent to render *Shamrock Oil* inapplicable. The decision is not mentioned as a problem in the Senate Report. And Home Depot has not identified any indication anywhere in the eight years of legislative proceedings leading to CAFA's enactment of an intent to override the settled construction of "defendant."

Furthermore, the legislative history contains strong indications, in addition to the repetition of language with a settled meaning, that Congress intended to leave untouched the category of parties entitled to remove. At various points in Congress's consideration of CAFA, draft legislation expanded the parties entitled to remove class actions beyond defendants to include plaintiff class members. *See, e.g.*, Class Action Fairness Act of 1998, S. 2083; Interstate Class Action Jurisdiction Act of 1999, H.R. 1875; Class Action Fairness Act of 2002, H.R. 2341; Class Action Fairness Act of 2003, S. 274. Congress ultimately chose to revert to permitting removal only by a "defendant," in line with the existing removal statute, 28 U.S.C. § 1441(a).

### B. Home Depot's arguments for a different construction of CAFA are unpersuasive and provide no reason for review by this Court.

Home Depot's argument that the language of CAFA supports an expanded definition of "defendant"

rests principally on the phrase in § 1453(b) stating that a class action "may be removed by any defendant without the consent of all defendants." Home Depot, like all the prior litigants that have argued that CAFA altered the definition of "defendant," contends that the statute's use of the word "any" indicates an intent to expand the category of "defendants" who are entitled to remove.

The courts of appeals have unanimously rejected this argument, and for good reason. Viewed in context, the meaning of the word "any" is as part of a unitary phrase intended to make clear that, in contrast to earlier removal statutes that required all defendants to join in or consent to removal of an action, under CAFA any one (or more) defendant may remove without the consent of all. *See* Pet. App. 7a; *Tri-State Water*, 845 F.3d at 353, 355; *MERS*, 680 F.3d at 854; *Westwood*, 644 F.3d at 804; *First Bank*, 598 F.3d at 917; *Palisades*, 552 F.3d at 335–36; *see also* S. Rep. No. 109-14, at 49 (explaining the purpose of the phrase). As Judge Easterbrook put it in *First Bank*, the function of the word "any" in this phrase "is to establish that a single defendant's preference for a federal forum prevails," notwithstanding the requirement of unanimity applicable to other removal statutes. 598 F.3d at 917.

Home Depot argues that this construction renders the word "any" superfluous because the same result could have been achieved with the word "a." That Congress may have two ways of expressing a phrase to achieve the same result, however, does not make its choice of one of them superfluous and require giving it something other than its natural meaning. *See, e.g.*, *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011). Here, Congress had to introduce the word "defendant" either with the article "a" or the adjective "any," and

it chose the word most suited to convey clearly that "any" one defendant may remove without the consent of all defendants: "[T]he use of the word 'any' juxtaposed with the word 'all' was intended to convey the idea of non-unanimity." *Palisades*, 552 F.3d at 335.

The reading of the statute adopted below and by the other courts of appeals both gives meaning to each word of the phrase and interprets the phrase as an integrated whole consistent with the principle of "ordinary English usage" that governs statutory construction. *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009). An ordinary speaker of English who wanted to convey the non-unanimity rule that governs CAFA removal would do so just the way Congress did—by saying a class action "may be removed by any defendant without the consent of all defendants."[3] Even if it were correct to characterize that usage as involving some redundancy, giving the phrase its most natural meaning (as the courts of appeals have done) is fully consistent with this Court's recognition that Congress sometimes includes some repetition within statutes to "remove doubt" and that minor instances of redundancy in statutory drafting are common. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013).

By contrast, Home Depot's argument attempts to avoid the alleged redundancy by giving "any" a meaning it cannot bear. Although the word "any" may be

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[3] Confirmation that a normal English speaker or writer would choose both "any" and "without the consent" to explain the non-unanimity rule can be found in the Senate Report on CAFA, which likewise uses the term "any" in explaining how the statute eliminates the unanimity requirement: "First, any defendant would be able to remove a class action to federal court without the consent of any other defendant." S. Rep. No. 109-14, at 29.

expansive, it is expansive only within the bounds of the word it modifies: It does not expand the category to which it applies. *See United States v. Palmer*, 16 U.S. 610, 531 (1818) (Marshall, C.J.) (phrases introduced by "any" "must ... be limited ... to those objects to which the legislature intended to apply them"). Put another way, "any" is a "catchall" term, but it "does not 'define what it catches.'" *Small v. United States*, 544 U.S. 385, 388 (2005) (quoting *Flora v. United States*, 362 U.S. 145, 149 (1960)). To the extent that a party is not a "defendant" as that term was understood when CAFA was enacted, inserting the word "any" before "defendant" does nothing to bring that party within the realm of those entitled to remove class actions under the statute. As the court explained *Palisades*, "the use of the word 'any' cannot change the meaning of the word 'defendant.'" *Palisades*, 552 F.3d at 335. Thus, as Judge Easterbrook concluded in *First Bank*, the statute's use of the word "any" does not "impl[y] that 'defendant' means something different" from its previously established meaning. 598 F.3d at 917.

Lacking support for its position in the statutory language, Home Depot asserts that the construction given section 1453(b) by the courts of appeals is contrary to this Court's statement in *Dart Cherokee* that courts considering whether a particular case is removable should not apply an "antiremoval presumption." 135 S. Ct. at 554. Both the court below and the Seventh Circuit before it in *Tri-State Water* properly rejected that argument because the reading of CAFA they adopted in no way rests on such a presumption. Indeed, both the Fourth and Seventh Circuits have rejected the existence of any such presumption.

Long before *Dart Cherokee*, the Seventh Circuit not only anticipated that decision's holding that a removing party need not supply proof of jurisdiction in its petition for removal, *see Spivey v. Vertrue*, 528 F.3d 982, 986 (7th Cir. 2008), but also specifically rejected the existence of any "'presumption in favor of remand' when a case has been removed under the Class Action Fairness Act." *Johnson v. Pushpin Holdings, LLC*, 748 F.3d 769, 773 (7th Cir. 2014). *Accord Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("There is no presumption against federal jurisdiction in general, or removal in particular. The Class Action Fairness Act must be implemented according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions.").

The Fourth Circuit likewise anticipated *Dart Cherokee*'s holding. *See Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 297 (4th Cir. 2008) ("a [CAFA] defendant filing a notice of removal ... need only *allege* federal jurisdiction"). That court did not apply an "antiremoval" presumption in CAFA cases before *Dart Cherokee* and, following *Dart Cherokee*, disavowed any such presumption well before its decision in this case. *See Scott v. Cricket Commc'ns, LLC*, 865 F.3d 189, 194 (4th Cir. 2017) (Duncan, J.).

In fact, the decisions of the courts of appeals holding CAFA removal unavailable to counter-defendants rest on a different presumption altogether: the presumption that "Congress is aware of the legal context in which it is legislating" and adopts established meanings of terms it uses. *Palisades*, 552 F.3d at 334 n.4; *accord* Pet. App. at 10a–11a; *Tri-State Water*, 845 F.3d at 355. As both the Fourth and Seventh Circuits have recognized, nothing in *Dart Cherokee* calls into

question the application of that principle to CAFA, and this Court's rejection of an "antiremoval presumption" thus does not control the proper resolution of this issue. The insubstantiality of the argument that the consensus of the courts of appeals on this point is contrary to *Dart Cherokee* is demonstrated strikingly by the fact that Judge Niemeyer, who vehemently disagreed with *Palisades* when it was issued, agreed with the majority below that *Dart Cherokee* provides no basis for overturning the Fourth Circuit's holding in that case.

In sum, Home Depot's attacks on the correctness of the decision below are meritless and lack the force necessary to call for the exercise of this Court's discretionary jurisdiction in the absence of any disagreement among the lower courts. Unless and until one or more of the eight circuits that have not yet weighed in on the issue finds some merit in them—an unlikely prospect given their unpersuasiveness—this Court should decline Home Depot's invitation to take up the issue.

## III. The policy arguments of Home Depot and its amici do not warrant review.

Home Depot and its amici rest their case for review by this Court heavily on the policy argument, recycled from their request for review last year in *Home Depot v. Bauer*, that the courts of appeals have created a harmful "loophole" allowing significant class actions to be brought in state courts, contrary to the intent they ascribe to CAFA. There is no question that CAFA's purpose was to greatly expand federal jurisdiction, both original and removal, over large class actions—and equally no doubt that it has achieved that purpose and will continue to do so regardless of

whether counter-defendants are permitted to remove cases. That not *all* class claims are removable does not indicate that review by this Court is necessary to fulfill CAFA's purposes.

This Court has emphasized repeatedly that "it is quite mistaken to assume ... that 'whatever' might appear to 'further[] the statute's primary objective must be the law," because "no statute yet known 'pursues its [stated] purpose[] at all costs." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1724 (2017) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987)). CAFA certainly does not. As the Seventh Circuit pointed out in *Tri-State Water*, "CAFA only *selectively* increased federal jurisdiction over multi-state class actions." 845 F.3d at 357. "[I]t established restrictions on what class actions the federal courts could and could not entertain" rather than "roll[ing] out the welcome mat for all multi-state class actions." *Id.* Given the lack of statutory language supporting Home Depot's arguments and the specific indications that the statute's purpose was not to grant federal jurisdiction over *all* large multistate class actions, Home Depot "would need some monster arguments on this score to create doubts" about statutory meaning. *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1072 (2018).

The arguments of Home Depot and its amici are not monsters, but chimeras. Despite their claims that the approach of the courts of appeals will permit large-scale evasion of CAFA, the reality is quite different. Over the course of more than a dozen years since CAFA's enactment, the issue of removability of class counterclaims has produced a grand total of eight appellate decisions in only four circuits. One would think that a true nationwide problem might have generated

cases in the vast and populous swaths of the country covered by the First, Second, Third, Fifth, Eighth, Tenth, Eleventh, and D.C. Circuits. Aside from the federal appellate decisions on the subject, petitioners and their amici identify a relatively small number of class counterclaims that have resulted in district court and state court decisions and that would be subject to removal if their view of the statute were adopted. Reliable statistics are not available, but it seems overwhelmingly likely that these cases are a drop in the bucket compared to the hundreds of class actions filed in or removed to federal court as a result of CAFA, or to state-court class actions that were not removed under CAFA for other reasons.

The reasons that the courts of appeals' decisions have not opened the floodgates are apparent: Consumers and their lawyers have little or no control over where they may be sued.[4] The likelihood that a consumer sued in a collection or other matter in a state court has viable class counterclaims against the plaintiff or other parties likewise depends on factors largely outside the consumer's control. Moreover, even consumer defendants who may possess such claims are very unlikely to have the resources to pursue them. Consumers like Mr. Jackson do not have lawyers on retainer who can evaluate suits against them immediately and look for viable class claims. Indeed, the majority of consumers sued in collection actions have no

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[4] Home Depot complains repeatedly that it, too, had no choice with respect to the state-court forum in which the case was brought. *See, e.g.*, Pet. 12. But Home Depot acknowledges that, under the rule it advocates, even plaintiffs who choose to file actions in state courts will not have to fear that a "wily [consumer's] attorney" can transform the case into a non-removable class action against them. Pet. 22.

legal representation at all. FTC, *The Structure and Practices of the Debt Buying Industry* 45 (Jan. 2013) ("90% or more of consumers sued do not appear in court to defend"). One academic study published in 2014 examined a sample of 4,400 debt buyer lawsuits in Maryland and found that less than two percent of defendants had legal representation. Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L. Rev. 179, 187 (2014).

Nor do consumers like Mr. Jackson who are vulnerable to being sued in collection actions "pre-associate" with class action lawyers, in the hope that an unsuspecting corporate plaintiff unwittingly will open up the possibility of a non-removable national class action. Speculation that "wily" class action lawyers are luring corporate plaintiffs into suing their clients in so-called "magnet" jurisdictions to generate non-removable class actions is unrealistic, to say the least.

Even if the parade of horribles envisioned by Home Depot and its amici had substance, the solution would not be for this Court to rewrite the statute. If it were the case that CAFA's failure to provide for removal by parties other than defendants significantly impeded the goals of the legislation, it would be up to Congress to address that problem. As Judge Bybee observed in his concurrence in *Westwood* more than seven years ago, "CAFA achieves this particular result, and if Congress does not like it, Congress should rethink the rule." 644 F.3d at 809 (Bybee, J. concurring). That the bipartisan majorities that supported CAFA have not addressed this issue in the decade since the issue first emerged in the *Progressive* and *Palisades* decisions is not a reason for this Court to step in.

Congress is more than capable of amending the removal statutes when it is dissatisfied with their wording. For example, in late 2011—shortly after the Ninth, Fourth, Sixth and Seventh Circuits had all indicated that CAFA incorporated the settled judicial construction of the term "defendant" in earlier removal statutes—Congress enacted the Federal Courts Jurisdiction and Venue Clarification Act of 2011, which included modifications of 28 U.S.C. §1441(a) and 1446 to (among other things) clarify the operation of the requirement of unanimous consent to removal under those statutes in circumstances where defendants are served at different times. *See* Pub. L. No. 112-63, § 103, 125 Stat. 758, 759–62. In the Act, Congress repeatedly used the term "defendants" to describe the parties entitled to remove under those statutes, with no indication of any intent to alter the construction of that term developed by the courts in the years following *Shamrock Oil*. Aside from a conforming amendment necessary to update a cross-reference, moreover, that Act did not amend CAFA's removal provision.

By contrast, when Congress became aware of a real problem in the administration of CAFA's removal provisions, it did not hesitate to correct it. As originally enacted, 28 U.S.C. § 1453(c)(1), which provides for discretionary appeals of CAFA remand orders, required a party seeking leave to appeal to apply to the court of appeals not *less* than seven days after the remand order. Read literally, that provision that did not limit the time for taking an appeal, but penalized a would-be appellant for seeking leave to appeal too soon. In 2009, Congress fixed the statute by amending it to require that leave to appeal be sought "not more than 10 days after entry of the order." Statutory Time Periods Technical Amendments Act of 2009, Pub. L. No. 111-

16, § 7, 123 Stat. 1607 (amending 28 U.S.C. § 1453(c)(1)).

Congress has not taken any action to revise what Home Depot argues is an unintended "loophole." And Congress has given no indication of dissatisfaction with the courts' construction of the term "defendant" under CAFA or other removal statutes. If Congress has not seen fit to alter its own handiwork, this Court should not credit claims that enforcement of the statute as written undermines CAFA's objectives so profoundly that the Court's intervention is warranted.

Moreover, this case would be a particularly poor choice for addressing the issue even if it otherwise merited review because the class counterclaim here would still be subject to remand even if Home Depot qualified as a defendant entitled to invoke CAFA removal. Not only is there a significant, unresolved issue as to whether CAFA's $5 million amount-in-controversy requirement is satisfied, but, regardless of the resolution of that issue, remand will be required under CAFA's local controversy exception because of the common citizenship of more than two thirds of the class and the other additional counter-defendant, CWS. That the issue Home Depot raises may not even be outcome-determinative in this case is all the more reason not to disturb the consensus of the lower courts on the proper construction of CAFA.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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